1960

J. Earl Morris v. C. Leo Christensen and Dale Christensen : Brief of Respondent

Utah Supreme Court

Russell C. Harris; L. J. Summerhays; Attorneys for Plaintiff and Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

J. EARL MORRIS,

Plaintiff,

vs.

C. LEO CHRISTENSEN and
DALE CHRISTENSEN,

Defendants.

Case No. 9217

BRIEF OF RESPONDENT

RUSSELL C. HARRIS
300 Crandall Building
and
L. J. SUMMERHAYS
604-610 Boston Building
Attorneys for Plaintiff
and Respondent
Salt Lake City, Utah

TABLE OF CONTENTS

Authorities Cited

IN THE SUPREME COURT
of the
STATE OF UTAH

J. EARL MORRIS,

Plaintiff,

vs.

C. LEO CHRISTENSEN and
DALE CHRISTENSEN,

Defendants.

Case No. 9217

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent agrees with the Statement of Facts set out in Appellants' Brief with the exception that while page 3 of Appellants' Brief says that "Plaintiff looked to the South once as he crossed the intersection" it does not include statements of the Plaintiff (Respondent) concerning his looking before and during his crossing of State Street at said intersection. Appellants' Brief quotes Plaintiff's statement

that " 'As I was nearing the center of the intersection, I looked south,' " but omits Plaintiff's statement that before crossing any portion of the intersection, he looked both north and south for any approaching traffic. He testified "Well, after the light had changed I looked both ways and looked from the south and traffic had stopped before I proceeded." (R24) Neither does Appellants' Brief acknowledge a statement of the Plaintiff, (Respondent) admittedly indefinite, that he looked somewhat to the south as he proceeded past the center of the intersection or as he put it, "Well, as I was driving across, of course, as you are looking out of the side of your car, you can always see to the south a little bit." (R31)

In other respects, Appellants' Statement of Facts is adequate for the use of Respondent in stating his case.

STATEMENT OF POINTS

POINT I.

THE TRIAL JUDGE CORRECTLY FOUND THAT PLAINTIFF WAS GUILTY OF NO NEGLIGENCE.

ARGUMENT

POINT I.

THE TRIAL JUDGE CORRECTLY FOUND THAT PLAINTIFF WAS GUILTY OF NO NEGLIGENCE.

It is axiomatic that a Defendant is entitled to judgment as a matter of law, only if the evidence and the inferences therefrom, when viewed most favorably to the Plaintiff, would not reasonably support a judgment in Plaintiff's favor. In the instant case, then, unless all reasonable minds must agree that Plaintiff was guilty of negligence and that such negligence proximately contributed to cause his injury, Plaintiff was entitled to have the question submited to the jury, or, as here, to the Court.

The issue to be here determined is whether there was contributory negligence as a matter of law, on the part of the Plaintiff in having entered the intersection as he did and in failing to apprehend danger and take steps to prevent injury, and if there was such negligence, was it a proximate, contributing cause of the accident. The Utah Supreme Court, remarking on the matter of look-out, in the case of Spackman vs. Carson, 117 Utah 390, 216 P2d 640, cited by Appellant, held that unless all reasonable minds *must* say that the driver of a vehicle did not use due care in the matter of look-out under a particular set of circumstances, look-out is a question for the jury.

Plaintiff had the right to proceed into the intersection until such time as something appeared to indicate that it was not safe to do so. The language of this court, in a unanimous holding in a recent, similar case, Johnson vs. Maynard, 9 Utah 2d 265, 242 P2d 884, reads:

> "Conceding that the Defendant's emergency vehicle was plainly visible to the Plaintiff so she could have seen it if she had looked, that does not necessarily provide the full answer to the problem of contributory negligence under the circumstances here shown. A traveller approaching a signal-controlled

intersection with the light in her favor, has the right of way, and can rely on it until something appears to indicate it is not safe to do so. It is, of course, true that she cannot assume full protection by the traffic light and remain oblivious to cars approaching against it." But, said the court, she must pay attention to many other details such as her car, other cars, signals, pedestrians, and etc. "It is because of these numerous hazards and then to facilitate the orderly flow of traffic, that traffic lights are installed. They permit the motorist to enter the intersection with some assurance of safety when the traffic light is in his favor. Being under obligation to divide her attention to the numerous hazards just adverted to, plus the assurance that she might reasonably take from the fact that the traffic light was presumably holding any traffic from entering the intersection from the South, the trial court correctly determined that reasonable minds might find that in entering the intersection as the Plaintiff did, she was within the limits of due care under the circumstances, and consequently, the question of her contributory negligence was one of fact for the jury."

The case at bar presents almost an exact fact situation with the one above quoted. Two details are different. In the Johnson case, the Defendant's car was a police car (on an emergency run) and was plainly marked as such. In the case here considered, the Plaintiff had no advantage of distinctive markings on Defendants' vehicle to make it more easily recognized or apprehended. The Johnson case arose out of a collision that occurred during a busy time of day and while the Plaintiff there had to concern herself with more traffic than in instant case, she had only the same number of directions and no more incidental details to watch than did the Plaintiff here.

Both Plaintiffs entered a signal-controlled intersection with the traffic light in their favor. Both were required to keep a lookout for other traffic in the same number of directions, for pedestrians, signs, signals, and to the operation of their own automobile. Both Defendants' speed was about 40 miles per hour while Plaintiffs were going relatively slowly—from a stop to 12 to 15 miles per hour in our present case and approximately 5 to 7 miles per hour in the Johnson case. In the former instance, Plaintiff was struck just as she passed the intersection, while in our present situation, Plaintiff had completely crossed the highway, and, according to the Defendant, Leo Christensen, was actually 14 feet into 9000 South Street. Having entered the intersection after ascertaining that the highway was clear of any traffic approacing so closely as to constitute an immediate hazard, Plaintiff had completely passed over the intersection before being overtaken by Defendants. The testimony clearly shows that had the Plaintiff seen the Defendants' car, there would have been nothing in its approach to alert him of the danger or to suggest that he could not rely on the protection of the red light and presume that Defendants were about to afford him the right of way to which he was then and there entitled. The testimony of Defendant, Leo Christensen is that as he was one hundred feet from the intersection, he took his foot off the gas pedal and began slowing slightly. At 38 feet from the intersection, he said he began applying his brakes. Nothing in this sequence would, in the words of the trial judge, have put the Plaintiff "on notice that he had to do something to avoid the accident."

In the case of Martin vs. Stevens, 121 Utah 484, 243 P2d 747, after having commented on the duty of a Plaintiff

to exercise due care in observing for other traffic, Mr. Justice Crockett says:

> "But in so doing, he had the right to assume, and to rely and act on the assumption that others would do likewise; he was not obliged to anticipate either that other drivers would drive negligently, nor fail to accord him his right of way, until in the exercise of due care, he observed, or should have observed, something to warn him that the other driver was driving negligently or would fail to accord him his right of way. If this principle is not clear in the earlier Utah cases, it is firmly established by the more recent expressions of this court."

In reasoning the case of Martin vs. Stevens, and considering the cases cited by the Defendant in that case (some of which cases are here cited by Defendant) as a basis for holding a driver contributorily negligent as a matter of law, the language of the court is that

> "In the analysis of each of these cases, one principle which distinguishes them from the case at bar can be succinctly stated: Each of them was decided upon the proposition that the circumstances were such that the driver held to be negligent as a matter of law, either observed, or in the exercise of due care should have observed, the manner in which the other driver was approaching the intersection, and clearly could, by ordinary reasonable care, have avoided the collision. Or to state it in other words, the negligence, or manner of driving of the other driver, was such that the driver appraising the situation was alerted to it, or by using due care would have been so alerted in time so that by the exercise of ordinary precaution, he could have avoided the collision.

> And, in each of these cases, this seemed to the Court so clearly manifest, that reasonable minds could not find to the contrary."

The case under consideration must be analyzed upon these principles. The testimony is that Plaintiff did not see Defendants until the moment of the collision. Plaintiff was obviously not alerted to the danger at such a time and in such a manner that by the exercise of ordinary precaution he could have avoided the collision. It follows, then, under the above principles, that we determine whether or not the circumstances were such that by using ordinary care, the Plaintiff could have been alerted to the danger in time to avoid the collision.

The reason or reasons for which Plaintiff could not or did not see Defendants' car, we may not be able to ascertain with certainty under the circumstances of this collision. But what seems unequivocally clear, is that the facts surrounding the collision are such that the trier of facts could readily find that there was no negligence on the part of the Plaintiff, which proximately contributed to the injury, in which event, the decision of the lower court should be affirmed.

There is no quarrel with the concept that Plaintiff was required to look. This he did at no less than two critical points—once before starting across the intersection, and once as he approached the center of the highway, and in addition, as we interpolate certain inept phrasing in Plaintiff's testimony, he looked toward the source of possible danger as he crossed the second half of the highway. This would appear to be the conduct of an "ordinary, reasonable, prudent man under the circumstances." It is

not merely a matter of how often he looked, but from what points and in what direction. And, admittedly, as Plaintiff is required to look, he is also required to see. But he is obligated to see only what is there to be seen.

Several factors should be mentioned in this connection. While daylight was breaking, it was still dark enough to require headlights, which were apparently in use on both cars, and it was dark enough that the streets were still lighted by artificial lighting. Vision is obviously encumbered by such circumstances. Then, as Plaintiff approached the center of the highway, the automobile of witness Lund, parked on the inside or left lane of travel going north, partially obstructed the Plaintiff's view south on State Street. Another explanation lies in the ratio of the speed of the two vehicles. Plaintiff estimated his speed at impact, at approximately 12 to 15 miles per hour. Assuming an approximately uniform rate of acceleration from zero at a stop to 13.5 miles per hour, (the mean average of 12 to 15 miles per hour), Plaintiff's average speed from the crosswalk at the west edge of State Street to the point of impact, was about 6.75 miles per hour. The Court will take notice of the fact, that at this speed it would have required approximately 7.07 seconds for Plaintiff to travel the distance of 70 feet, which distance appears from all the evidence to be the minimum distance travelled by Plaintiff from his stopped position at the west edge of State Street to the point of impact across the 70 foot wide street. The Court will notice also that at the speed of 40 miles per hour, as estimated by Defendant, Leo Christensen, he would be travelling 59 feet each second. In the 7.07 seconds required for Plaintiff to traverse 70 feet, Defendants would have travelled approximately 417 feet. Taking into ac-

count his having slowed slightly at 100 feet and again at 38 feet, at a most conservative estimate, Defendants would have been 350 feet from the intersection when Plaintiff started across. At the time Plaintiff looked south as he was nearing the center of the intersection, Defendants' car would have been something more than 175 feet away; just how much more depends upon how far Plaintiff was from the center of the street when he looked south, coupled with the consideration that Plaintiff ould have consumed more than half of this estimated 7.07 seconds (used to cross the entire street) as he travelled the first 35 feet from his stopped position to the center of the street. While the mathematics here are exact, the conclusions drawn are in some instances, admittedly, best estimates. They suggest, however, some of the calculating required by the trier of facts in this instance, resulting in judgment for the Plaintiff. It would seem clear that in view of all the circumstances, Plaintiff had no duty to see danger at that distance, particularly with the additional limited protection offered by the red light controlling traffic from the south. Quoting again from Johnson vs. Maynard:

> "With the assurance that she might reasonably take from the fact that the traffic light was presumably holding any traffic from entering the intersection from the south, the trial court correctly determined that reasonable minds might find that in entering the intersection as the Plaintiff did, she was within the limits of due care under the circumstances, and consequently, the question of her contributory negligence was one of fact for the jury."

It is noteworthy that none of the cases cited by Defendants as a basis for overturning the verdict of the lower

court involve a collision at an intersection where the Plaintiff had the added protection and continuing assurance of a red light, presumably to control oncoming traffic from either side.

The case of Johnson vs. Syme, 1957, 6 Utah 2d 319, 313 P2d 468, heavily relied upon by Defendants, is clearly distinguishable on its facts from the case at bar. In the Johnson case, Defendant's car, although not seen by Plaintiff until it appeared directly in front of her at a distance of 20 to 30 feet, had been seen by other motorists who were following Plaintiff about a block behind, and who "had no difficulty whatever in observing and watching the whole occurrence, including the decedent's (defendant's) car approach toward the highway from a considerable distance along the Draper Road, through the stop sign, into the intersection and on to the collision and fatality." P. 469.

In instant case, the Defendants' car approached rapidly from the side, from a partially obstructed position, striking Plaintiff from the side almost as, or in one version of the testimony, actually after he had reached the safety of the far side of 9000 South. The trial court commented on the testimony of Defendant, Leo Christensen, "that the Plaintiff had gotten clear through the intersection, 14 feet out in 90th South Street and then Mr. Leo Christensen chased him out there and struck him." The difference as concerns the Plaintiffs in the two cases is as between closing one's eyes to what is clearly in line of vision, almost directly ahead and, in being rapidly attacked from a vantage point almost (at the time of impact) from behind the possibility of vision to the side.

Plaintiff submits that the principles set out by the Utah Court in Bates vs. Burns, 1955, 3 Utah 2d 180, 281 P2d 209, are appropriate to the case at bar and that Defendants' attempt to distinguish the case on factual differences is ineffectual.

It is true that in the case at bar, Plaintiff did not see the Defendants' car, but as indicated by the lower court, even had he seen said car, there would have been no reason for him to suppose there was any need for action on his (Plaintiff's) part to avoid the collision. To quote from Defendant's brief in reference to this case:

> "Cases such as Bates vs. Burns . . . ., allow a driver the right of way to proceed without fault into a position of peril, even though his lookout might have been inadequate, if that driver could reasonably have assumed that the other driver would yield to him."

Further, the language of the court in the Bates case is clearly in point here:

> "It cannot be questioned that Plaintiff was in the intersection so substantially ahead of the Defendant that he clearly had the right of way, and he could be found by the jury to be within the standard of reasonable care in assuming that Defendant saw him and would yield the right of way, and that Plaintiff reasonably relied upon such assumption and there was nothing to warn him to the contrary until it was too late for him to avoid the collision."

CONCLUSION

The trial court correctly found that Defendant, C. Leo Christensen was negligent, which negligence was the sole proximate cause of this accident and that Plaintiff, J. Earl Morris, was not contributorily negligent. Judgment of the lower court should be affirmed.

Respectfully submitted,

RUSSELL C. HARRIS
300 Crandall Building
and
L. J. SUMMERHAYS
604-610 Boston Building
Attorneys for Plaintiff and Respondent